was clear that a substantial number of plaintiffs and their counsel disagreed and intended, at that juncture, to opt out. Critically, however, the proposed settlement agreement was designed with the understanding that plaintiffs' counsel would have a period of time to pursue further discovery regarding the defendants' financial wherewithal. That is, the defendants agreed to make available all information reasonably requested by the plaintiffs that would reveal: (1) all of the assets of Sulzer Orthopedics, its parent Sulzer Medica USA, and its Swiss grandparent, Sulzer Medica Ltd.; (2) all of the insurance policies held by these entities that might be available to pay claims; and (3) the likelihood the plaintiffs could "piece the corporate veil" and pursue claims against Sulzer Orthopedics' "great grandparent," Sulzer AG. As the Court explained in its Order granting conditional approval:

> If plaintiffs conclude that the information they obtain through this discovery shows there is more money available to pay plaintiffs than is currently contemplated by the settlement agreement, then the plaintiffs can withdraw from the agreement, or insist it be modified to account for those other sources of payment; class counsel has assured the Court, in fact, that plaintiffs will withdraw from the proposed agreement if they conclude that the defendants are contributing to this settlement less than substantially all of their available and reachable assets.
>
> Furthermore, the parties contemplate sharing all of this discovery information with counsel for all class members, including counsel appearing only in state court. This arrangement will ensure an extremely thorough viewing of the defendants' financial circumstances by those persons most interested in ensuring that, in fact, the defendants are "suffering" the maximum judgment they can withstand.

Order at 38-39 (docket no. 61).

Because the discovery task was formidable, the Court appointed ten lawyers to a Special State Counsel Committee ("SSCC") for the purpose of "assist in and/or monitor the discovery process." Order at 1 (docket no. 129). These lawyers, who represented class members but did not have a federal case pending within the MDL, joined plaintiffs' class counsel in the MDL to engage in substantial discovery and strenuous negotiation with counsel for the defendants. As a result of this discovery and negotiation process, counsel for the plaintiffs obtained a more accurate understanding of the defendants' finances, and ultimately uncovered additional sources of settlement funding.

After having completed their discovery and negotiations, the parties submitted a new proposed settlement agreement. The funding value of this new settlement agreement was substantially more favorable to the Plaintiff Class than was the first settlement agreement the Court had preliminarily approved on August 29, 2001. The primary improvement was that the "funding value" of the new agreement was approximately $1.045 billion, or about $447 million more than the first settlement agreement. As such, the promised compensation for the plaintiff class increased substantially. For example, compensation payable to a plaintiff who underwent one revision surgery increased from $37,000 in cash and $20,000 in stock to approximately $160,000, most of all of which was in cash, plus another $46,000 in cash available for payment of contingent attorney fees.

The Court conditionally approved this proposed agreement, and scheduled a final fairness hearing. Although the size of the Plaintiff Class exceeded 30,000 individuals (not including derivative claimants), the Court received only 30 or so objections to the fairness of the revised settlement agreement, and all but seven objections were withdrawn before the final fairness hearing.[4] Among the witnesses at this hearing

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[4] The benefits of the Final Settlement Agreement were described to class members and their attorneys, before the Final Fairness Hearing, in the

were a member of attorneys, representing hundreds of class members, who had vehemently objected to the first proposed settlement agreement; these attorneys now testified in support of the final proposed settlement agreement. Indeed, there was no witness who testified in opposition to the final proposed settlement agreement and no attorney who argued against its approval. The Court summarized the evidence at the final fairness hearing as follows:

> During this hearing, the Court received testimony from 13 witnesses, all testifying in support of the settlement. Though given the opportunity, no objector spoke at the hearing. The Court undertook its own questioning of witnesses and pursued the concerns raised by all of the objectors, including those who had withdrawn their objections prior to the hearing. It is not an overstatement to say that the evidence weighing in favor of the proposed settlement agreement was overwhelming. Attorneys who represent hundreds of class members and who had objected strongly to [the] earlier proposed settlement agreement joined in a chorus of support for the current proposed Settlement Agreement. A large number of attorneys and witnesses representing disparate interests all averred they believe the Settlement Agreement has extracted from the defendants close to the best terms possible without forcing the defendants into bankruptcy – an alternative that all felt would be disastrous for the Class. One witness – who had earlier opposed both national class certification and the terms of the first proposed settlement agreement – summed up when he testified he believes the current Settlement Agreement is "the best opportunity for the most people to recover the most money the soonest."[5] Essentially, the message the

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"Class Member and Attorney Guide," which may be viewed at http://www.sulzerimplantsettlement.com/

[5] As another witness stated, "this is the best mechanism for resolution in this particular case under these particular circumstances."

> Court received, from both represented and unrepresented Class members, was that it would be unjust and unfair if the Court did not approve the proposed Settlement Agreement.

Order at 2-3 (May 8, 2002) (docket no. 340)

Accordingly, on May 8, 2002, the Court entered an Order granting final certification to the national plaintiff class and sub-classes, and granting final approval to the settlement agreement between the plaintiff class and the Sulzer defendants. See docket no. 340. Because this Final Settlement Agreement provided that the Sulzer defendants retained the right to terminate and withdraw from the Agreement at any time prior to May 31, 2002, the Court's May 8, 2002 Order was not a final, appealable Order. After the Suzler Defendants elected not to exercise their right to terminate the Agreement, however, the Settlement Agreement became irrevocable and the Court entered an Order on June 4, 2002, confirming its May 8, 2002 Order and dismissing all settled claims with prejudice. See docket no. 353. The June 4, 2002 Order explicitly stated: "This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a final appealable Order." Order at 2. Thereafter, no interested party filed a notice of appeal. Thus, there is no question but that the Court's June 4, 2002 Judgment Order, giving official approval to all of the terms and conditions contained in the parties' Settlement Agreement, was final.

B. The Final Settlement Agreement[6]

To understand fully some of the provisions that the plaintiff class members and the defendants included in their Final Settlement Agreement, it is important to know the

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[6] The Final Settlement Agreement may be viewed by visiting: http://www.sulzerimplantsettlement.com/ and clicking on "Amended Class Action Settlement Agreement."

parties' overriding concerns. As noted above, the first state court case against Sulzer Orthopedics to go to trial ended in a plaintiff's verdict. Specifically, on August 30, 2001, three plaintiffs in the Texas state court case of Rupp v. Sulzer Orthopedics, Inc. obtained a verdict exceeding $15 million. Given that there were literally thousands of similaryly-situated plaintiffs around the country, it was immediately clear to all parties that the total amount of Sulzer Orthopedics' assets was dwarfed by its likely total amount of liability. It was also clear that, if Sulzer Orthopedics simply declared bankruptcy, even a successful plaintiff would not receive any money for years. And, all parties agreed that Sulzer Orthopedics was worth more as a going concern, whether viewed from a social perspective (it employed many people, and manufactured valuable and useful medical products) or a purely financial perspective (a bankruptcy estate surely had less value than an operating business). Thus, the primary goals of the parties, as they attempted to negotiate a settlement, may be summarized as follows:

1. The plaintiffs wanted to receive the most compensation for their injuries that they could.

2. The plaintiffs wanted to receive compensation as quickly as they could, especially because many plaintiffs were elderly (their average age was over 60 years old), and also wanted to ascertain how much that compensation would be.

3. The plaintiffs wanted a mechanism allowing those who were more severely injured to obtain more compensation.

4. All parties wanted to avoid forcing Sulzer Orthopedics into bankruptcy and to allow it to continue as a going concern, partially to assure complete funding of all aspects of the settlement (including certain additional, later funding obligations Sulzer agreed to undertake).

> 5. All parties wanted to define the class and design the Settlement Agreement to ensure that all those who were injured because of the product defect obtained relief, but also ensure that those not injured by the product defect did not obtain any of the settlement funds.
>
> 6. Sulzer Orthopedics wanted to ensure that, through settlement, it would eliminate all outstanding liability to the plaintiff class and to those subrogated [th] their interests.
>
> 7. Sulzer Orthopedics also wanted to qualify, as surely as it could, the amount it would ultimately pay to completely settle the plaintiffs' claims, with few contingencies.

To meet the first and fourth goals, Sulzer Orthopedics and related companies gave the plaintiffs unprecedented access to their financial positions during discovery. As a result, the parties were able to agree on the maximum amount of money that the defendants could pay to the plaintiffs, without driving Sulzer Orthopedics into bankruptcy. This is how the Final Settlement Agreement came to be worth over $1.045 billion.

To meet the fifth goal, the parties included in their Final Settlement Agreement certain deadlines. For example, the Settlement Agreement provided that, for a class member to obtain benefits related to having undergone revision surgery to replace an Inter-Op shell, the class member had to obtain that surgery before June 5, 2003. Settlement Agreement at §3.4(b)(i).[7] This deadline (along with many others) was

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[7] There are actually dozens of negotiated deadlines related to different products and different medical procedures. Thus, while the deadline for revision surgery is June 5, 2003, for Inter-Op shells, the revision surgery deadline is November 17, 2003 for Natural Knee tibial baseplates, and September 8, 2004 for reprocessed Inter-Op shells. See Settlement Agreement at §3.4(b,c). There are also different deadlines associated with each product type and other related medical procedures, besides revision

carefully negotiated, and the subject of close examination by the Court at the final fairness hearing. The scientific and bio-statistical evidence showed that 99.9% or more of those class members who would need revision surgery as a result of the product defect would obtain it before this deadline; conversely, any person who obtained revision surgery on or after this deadline almost certainly needed it for reasons other than a defect in the product.[8] Thus, the parties negotiated numerous deadlines, based on epidemiological and other studies, to ensure that class members who needed revision surgery because of the product defect obtained benefits, while class members who needed revision surgery for other reasons did not receive any payment from the settlement funds.

Notably, the evidence and argument at the fairness hearing made clear that these deadlines were actually quite generous; Sulzer initially resisted these deadlines, based on its belief that they swept too broad a net, allowing for payments to individuals who were not actually injured by a defective product. Sulzer ultimately agreed to these generous deadlines, however, in order to advance the second, third, sixth, and seventh goals. By setting the chosen deadlines, Sulzer Orthopedics was confident that the Settlement Agreement would resolve its liability to all plaintiffs who suffered an injury that was proximately caused by a defect in its products. Furthermore, because the parties could predict how many class members would ultimately need and obtain revision surgery before the deadlines, and could project the likelihood that a class member would suffer any number of identified extraordinary injuries, the parties could: (1) determine with some precision how much each class member would receive, depending on the nature of their injuries; (2) determine how to apportion the total settlement funds into various sub-funds

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surgery (e.g., surgery to re-affix, rather than remove, the medical device).

[8] See Final Fairness Hearing tr. At 276-78 (Joseph Poirkowski); id. At 149-58 (Victor Goldberg). The evidence showed that, even in cases where patients receive an implant that has absolutely no defect, between 0.5 and 1.5 percent of patients later need revision surgery.

(e.g., $100 million into the Extraordinary Injury Fund, $622.5 million into the Affected Product Revision Surgery Fund, and $1 million into the Medical Research and Monitoring Fund; see Settlement Agreement at §2.2); and (3) allow Sulzer Orthopedics to forecast intelligently the cost of certain "contingent" liabilities (e.g., payment of class members' subrogated medical expenses, to the extent the total of such expenses exceeded $60 million; see Settlement Agreement at §3.9(a)). Indeed, these deadlines were integral to the creation of a "Guaranteed Payment Option," which claimants could select to speed up their receipt of benefits; see Settlement Agreement at §8.4 (promising claimants who obtained revision surgery at least $40,000 of their total benefits within 45 days). Furthermore, because the Settlement Agreement set out fairly precisely the amount of benefits and the timing of payment (which in turn, were premised on the deadlines), the number of class members who ultimately opted out of the Settlement Agreement was extremely low – less than 45 out of over 30,000 class members. This low opt-out rate also advanced the sixth and seventh goals.

Another important provision of the Settlement Agreement that was negotiated by the parties and examined carefully by the Court at the Final Fairness Hearing was inclusion of a detailed claims administration process. This process was designed to ensure the validity of claims, and to pay benefits to deserving claimants as efficiently and fairly as possible. Counsel for the plaintiffs, in particular, were afraid that the process of examining plaintiffs' claims for benefits, and the process of actually making payments for valid claims, might turn into a lengthy morass. This concern was based on the experience of all parties' counsel in other class-action settlements. Accordingly, the parties designed a mechanism for claims administration that included: (1) specified formats for submission of claims; (2) deadlines for submission of claims; (3) deadlines for review of claims by the Claims Administrator; and (4) several mechanisms for claimants whose claims were denied to cure deficiencies and obtain

review. See generally Settlement Agreement §4.6.[9] For example, the Settlement Agreement provided that a claimant who underwent revision surgery had to submit a claim form within 180 days, or six months. Id. §4.2(a). Within 90 days of receiving an acceptable claim form, the Claims Administrator had to issue a preliminary benefits determination. Id. §4.6(c). There then followed deadlines for: (1) challenges by plaintiffs to preliminary determinations; (2) issuance by the Claims Administrator of a final benefits determination; and (3) appeals of the final benefits determination to a Special Master. Id. at §4.6(d-f).[10] The parties were in complete agreement that this claims administration process should be completely extra-judicial; the parties believed that, given the extreme volume of work involved and the need to satisfy precise deadlines, the timing of any judicial process would be too uncertain.

Once again, the claims administration process, in all its detail, was specifically negotiated by the parties to advance the goals listed above. The six-month deadline for filing a claim for revision surgery benefits, for example, was deemed ample, even generous, to ensure that a plaintiff would not forfeit benefits because of any difficulty with the claims process, itself. On the other hand, the 6-month deadline ensured that the claims administration process would not extend too long, because certain payments by the Claims Administrator could not be made to any claimant until the entire universe of claims was known. See, e.g., Settlement Agreement at §3.4(b) (noting that the $160,000 revision surgery benefits are payable to a

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[9] Indeed, the claims administration process provides for up to four levels of review of a plaintiff's claim. See also http://www.sulzerimplantsettlement.com/. This website also includes links to: (1) "Claim Forms for Settlement Benefits," which sets out the Court-approved forms that claimants must use to make a claim; (2) "Important Dates," which summarized the deadlines for submission of claims; and (3) "Claims Administrator Procedures," which catalogs all of the procedures promulgated by the Claims Administrator.

[10] The Claims Administrator later added even another layer of review, adopting a procedure allowing plaintiffs to move the Special Master to reconsider. Claims Administrator Procedure 30(8).

plaintiff in two increments: (1) $130,000, payable within 45 days of the Claims Administrator's Final Determination; and (2) $30,000, payable within 45 days of "the date on which the Claims Administrator can make a reasonable estimate of the total number of [revision surgery] claims").

Thus, the Claims Administration deadlines were designed to advance the second goal listed above – getting compensation to deserving plaintiffs as quickly as possible, and ascertaining how much that compensation would be. The Claims Administrator process and procedures also: (1) helped ensure that plaintiffs who were injured because of the product defect would obtain relief, while those not injured by the product defect would not obtain settlement funds (the fifth goal); (2) made certain that more severely injured plaintiffs obtained more compensation (the third goal); and (3) allowed Sulzer Orthopedics to forecast the cost of certain "contingent" liabilities (the seventh goal). It is also notable that the cost of claims administration, itself – which had to be paid for out of the settlement funds – was fairly quantifiable and predictable, given the parties' knowledge of what the entire process involved.

Having set out this explanation of why the parties included certain provisions in their Settlement Agreement, and why the Court concluded after the Final Fairness Hearing that these particular provisions were "fair, adequate, and reasonable," the Court now examines the merits of Kane's motion.

II. Purported Appeals of Denials of Claims.

The claims administration process created by the parties and the Court has been a model of fairness and efficiency. In the 20 months following the Court's final approval of the Settlement Agreement in this case, the Claims Administrator has received claim packets form over 11,000 claimants. Each claim packet contains dozens (sometimes hundreds) of pages, including claim forms, medical records, insurance agreements, attorney-fee contracts, and other materials. In addition to

receiving and reviewing these documents, the Claims Administrator has fielded hundreds of telephone calls each month, helping plaintiffs and their attorneys understand the claims administrator process and their obligations. Despite this tremendous and painstaking workload, the Claims Administrator has processed virtually all of the claim packets. Already, the Claims Administrator has issued awards to beneficiaries of the Sulzer Settlement Trust totaling over $700 million. Still remaining is the even more exacting task of reviewing class members' individual claims on the Extraordinary Injury Fund.

As noted above, during the claims administration process, the Claims Administrator reviews each claim for timeliness relative to several deadlines that were negotiated by the parties. Further, claimants who are unhappy with any aspect of the Claims Administrator's determination, including his application of these deadlines, have several opportunities to seek review. Ultimately, a claimant may appeal the Claims Administrator's final determination to a "Special Master." See Settlement Agreement at §4.6(f). The Settlement Agreement makes clear that the Special Master's conclusion then become the "final and binding determination" of a plaintiff's claim.

Despite the provisions in the Settlement Agreement establishing the finality of the claims administration process, a large number of claimants have sought judicial review of the decisions of the Claims Administrator and Special Master. Some of these attempts to obtain review are directed to this court, and they come in several forms, including (1) "appeals" of the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1059); (2) "objections" to the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1257); (3) "motions for relief" from the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1667); (4) motions to amend the Claims Administrator's Procedures (e.g., docket no. 980); (5) motions to enforce the Settlement Agreement (e.g., Kane's motion,

docket no. 1179);[11] (6) motions to reconsider earlier Orders that denied requests for review (e.g., docket no. 1621); and (7) letters asking the court to direct the Claims Administrator or Special Master to reconsider. Other attempts to obtain review bypass this Court and are directed, instead, to the Sixth Circuit Court of Appeals. See, e.g., docket no. 1617 (purportedly taking an appeal "from the Special Master Determination of January 8, 2004").

In an earlier opinion, the Court tried to make clear that none of these mechanisms are allowed or appropriate, because the Settlement Agreement does not provide for them. In an Order dated September 18, 2003 (docket no. 1146), the Court addressed six requests, by five claimants, that this Court review the Special Master's "final and binding" determinations that they were not entitled to certain benefits. In examining five "appeals" to this Court of the Special Master's determinations, and one motion to amend the Claims Administrator's Procedures, the Court explained:

> The Settlement Agreement between the parties in this case provides that: (1) a settling plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with court-appointed Special Master; and (4) "[a]ny determination by the Special Master...shall constitute a final and binding determination." Settlement Agreement at §4.6(g).

Order at 2. Accordingly, the Court overruled all six of the requests asking this Court to review, or force reconsideration of, the Special Master's determinations.

Since that time, the Court has received many dozens of

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[11] Kane also states that her motion to enforce "amounts to an appeal to the District Court of the Special Master Determination." Memo. in supp. at 1 n.1.

similar requests, like Kane's, seeking judicial review of the decisions of the Claims Administrator and Special Master. Most of these letters and motions simply ignore the Court's Order dated September 18, 2003. Some of the plaintiff class members, however, seek to distinguish this Court's earlier Order, raising different arguments as to why, in their particular case, judicial review is appropriate.

With the instant Order, the Court reaffirms its earlier conclusion that none of these arguments is persuasive, and none of the plaintiffs' requests for review is allowed or appropriate under the Settlement Agreement. Below, the Court addresses three arguments made most often by plaintiffs who purport to take an "appeal" to this Court from the determinations of the Claims Administrator or Special Master. Given the great number of requests for review, the Court will not issue a separate opinion addressing each one.

A. "Substantial Compliance"

Plaintiff Kane (and many other claimants) assert that, even though they missed certain deadlines, they should be excused from this failure because they "substantially complied" with the Settlement Agreement. By invoking substantial compliance, Kane asks this Court to use its equitable powers to allow him to avoid the strict settlement terms. See In re Eagle-Picher Inds., Inc., 285 F.3d 522, 529 (6th Cir. 2002), cert. denied, 537 U.S. 880 (2002) ("[t]he substantial compliance rule is an equitable doctrine"). "In general, substantial compliance means that a party has '[c]ompli[ed] with the essential requirements, whether of a contract or of a statute.'" Id. at 525 n.3 (quoting Black's Law Dictionary 1428 (6th ed. 1991).

Importantly, the doctrine of substantial compliance is not applicable if that part of the performance that did not occur was itself of substantial significance. "The theory of substantial compliance allows a court, acting in equity, to declare a contract provision satisfied although a party has made minor departures from the technical requirements of the

provision." Alling v. C.D. Cairns Irrevocable Trusts Partnership, 927 F. Supp. 758, 763 (D. Vt. 1996) (emphasis added). As the Tenth Circuit Court of Appeals has explained: By definition, the doctrine of substantial compliance does not materially modify a plan, but rather is simply a doctrine to assist the court in determining whether conduct should, in reality, be considered the equivalent of compliance under the contract. See John D. Calamari & Joseph M. Perillo, The Law of Contracts §11-15, at 454 (3rd ed. 1987) ("If a party has substantially performed, it follows that any breach he may have committed is immaterial.")

Peckham v. Gem State Mut. Of Utah, 964 F.2d 1043, 1052 (10th Cir. 1992).

In this case, Kane and other plaintiffs insist that their lateness is immaterial, a minor departure from the deadline requirements set out in the Settlement Agreement, and therefore may be overlooked. Whether this lateness is measured in weeks, as in the case of Kane's delayed filing of her claim forms, or merely days, as in the case of certain claimants who obtained revision surgery shortly after the deadline, many plaintiffs complain that strict adherence to the dates contained in the Settlement Agreement is unfair and oppressive. Kane asserts she "substantially complied" with the requirements of the Settlement Agreement by sending in completed claim forms and other necessary documents, even though she did not meet the stated deadline.

The problem with this argument is that, as discussed above, the parties paid special attention to the deadlines during negotiation of the Settlement Agreement. Their deadlines were based on a variety of factors, including bio-statistical studies, the cost of continuing the claims administration process itself, and the competing desires of ensuring that all injured plaintiffs receive compensation, while also ensuring that appropriate payments to the class are made as quickly as possible. Put simply, the deadlines are not immaterial, minor, technical

requirements; they were important underpinnings to the deal, with very real consequences to the defendants and to each member of the entire plaintiff class.

A simple example makes this clear. The Settlement Agreement provides that the Sulzer defendants will provide a fixed amount of funds toward settlement, plus additional funds contingent on the number of claimants. Specifically, the Settlement Agreement provides that, if more than 4,000 plaintiffs obtain revision surgery in connection with an Inter-Op shell or a Natural Knee tibial baseplate, and they "ma[k]e a claim in accordance with this Settlement Agreement," then Sulzer will pay half of the benefits to those claimants in excess of 4,000. Settlement Agreement §2.5(d).[12] In other words, for every such revision surgery claimant over 4,000, Sulzer has to pay additional funds toward settlement. Similarly, "in respect of subrogation or other claims for medical expenses paid on behalf of Class Members," Sulzer agreed to pay all such claims if the total exceeded $60 million. Id. §3.9(a). Obviously, if the Court allowed an "equitable" change in the deadlines of the Settlement Agreement, it could have a very significant impact on the amount of money Sulzer will have to pay for these "contingent" amounts.[13] Moving the deadlines back will only

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[12] To be more specific:

In the event that there are more than 4,000 Affected Products Recipients that have an Affected Product Revision Surgery relating to (i) an Inter-Op Shell (other than a Reprocessed Inter-Op Product) prior to June 5, 2003 and/or (ii) a Tibial Baseplate prior to November 17, 2003 and who have made a claim in accordance with this Settlement Agreement, the Parties agree that any benefits owed to such Class Member pursuant to Section 3.4(a), Section 3.5(b), Section 3.7 and Section 3.9(a) shall be borne equally by Sulzer and the Sulzer Settlement Trust such that Sulzer shall deliver to the Sulzer Settlement Trust 50% of any such benefit at the time such benefit is paid to a Class Member and the Sulzer Settlement Trust shall provide for the additional 50% with funds payable pursuant to Sections 2.5(a)-(c) above.

[13] In fact, there have been more than "4,000 Affected Products Recipients" as contemplated in the §2.5(d) of the Settlement Agreement, so Sulzer is having to pay these contingent amounts. The Settlement

increase the number of claimants over 4,000, making Sulzer's cost of settlement go up.

Further, an "equitable" change in the deadlines will also have a negative impact on the total amount of money received by each class member. After all contemplated payments from the Settlement Fund have been made, the Settlement Agreement contemplates a "pro rata" distribution to the claimants of any residue of funds. See Settlement Agreement §§5.2, 15.6. Moving back the deadlines will only increase the total number of claimants, and thus reduce the pro rata amount of residue each claimant may receive.

Put simply, to allow Kane and the dozens of other claimants who have missed the negotiated deadlines to now obtain benefits anyway would be to significantly alter the terms of the deal. The Sulzer defendants would pay more than they agreed, and successful claimants would receive less than they agreed. The differences could easily run into tens of millions of dollars. It is wrong and inaccurate to assert, as Kane and other claimants do, that neither the parties nor the Settlement Trust would suffer "any prejudice" if the Court allows them to avoid the deadlines by which they agreed to be bound when they chose to participate in the Settlement Agreement. The deadlines are not minor, technical details, and changing them would lead to important consequences unintended by the parties.

The Court also notes here that Kane and other claimants point to §9.1 of the Settlement Agreement to support their argument that this Court may use its equitable powers to allow for "substantial compliance" with deadlines. This provision states that

> the Court shall retain exclusive and continuing jurisdiction of the Complaint, the Parties, all Class

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Agreement also provides that, if more than 64 plaintiffs obtain revision surgery in connection with a reprocessed Inter-Op shell, Sulzer will have to pay all of the benefits to those claimants. Id. §2.5(c). Once again, there have, in fact, been more than 64 such plaintiffs, so Sulzer is having to pay these contingent amounts.

> Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8), Sulzer, Sulzer AG and the other Released Parties, and over this Settlement Agreement with respect to the performance of the terms and conditions of the Settlement Agreement, to assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement, and to interpret and enforce the terms, conditions and obligations of this Settlement Agreement.

Settlement Agreement §9.1.. But this provision weighs against Kane, not for her. The deadlines that Kane (and other claimants) seek to avoid are important "terms and provisions" that were carefully and explicitly negotiated by the parties. The Court must enforce these deadlines as written, if it is to "assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement." Thus, the Court rejects the argument that claimants should be allowed to obtain benefits under the Settlement Agreement, even though they did not complay with is crucial claims.

B. Special Master

In their purported "appeals" to this Court, many claimants, including plaintiff Kane, assert that this Court has jurisdiction over such appeals, and indeed must accept and review such appeals, because the determination they want this Court to review was made by a "Special Master." These claimants point to Fed. R. Civ. P. 53(e)(2), which provides that a party may file objections to a Special Master's report and then move the Court to modify or reject the Special Master's recommended ruling. Kane insists the Court is obligated to review the Special Master's determination in her case, and she offers argument why the Special Master abused his discretion in concluding that she was not eligible for benefits under the Settlement Agreement.

The flaw in this argument is that the position of Special

Master that was created by the Settlement Agreement is not the same as the position of Special Master discussed in the Federal Rules of Civil Procedure. Neither the parties nor the Court ever contemplated any possibility of an appeal being taken by any party (whether a plaintiff or a defendant" from the benefits determination of the Special Master appointed under the Settlement Agreement. Indeed, the parties designed the entire claims administration process with the specific goal of avoiding the involvement of any court with benefit determinations.

As an initial matter, it bears noting that the Settlement Agreement never refers to Rule 53. More important, the Court never proceeds under Rule 53, nor invoked it. Rather, the Court proceeded pursuant to the Settlement Agreement, which provides that, if a claimant wishes to appeal the Claims Administrator's Final Determination of benefits, "Class Counsel together with the Special State Counsel Committee shall appoint a Special Master (subject to the approval of the Court) to make a determination with respect to such Final Determination." Settlement Agreement §4.6(f). Counsel and the Court subsequently agreed to the appointment of Leo M. Spellacy, a retired state-court judge, as the Special Master to review the Claims Administrator's benefit determinations. In a one-line order, the Court "approve[d] the appointment of the Honorable Leo M. Spellacy, Esq. as Special Master over appeals from the Claims Administrator's Final Determinations." Docket no. 623. The Court did not itself appoint the Special Master, as would be required under Rule 53(a), but only approved the appointment by counsel, as mandated under the Settlement Agreement.[14] Compare Settlement Agreement at §5.5 (stating that "The Court may appoint a Special Master" to review common benefit attorney fee applications) (emphasis addes). Further, the Court did not

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[14] When the parties negotiated and signed their Settlement Agreement, the 1993 version of the Federal Rules of Civil Procedure were in force. Thus, the Court refers to this version of the Rule 53, and note the more recent, 2003 version.

ever enter an "order of reference" that "specif[ied] or limit[ed] the master's powers," as normally would be required under Rule 53(c). This is because the Court, and the parties, were not proceeding under Rule 53. The Special Master's powers and duties were set out under the Settlement Agreement, not the Rules of Civil Procedure.

Indeed, it was precisely because the parties wanted to avoid the involvement of this or any other Court with benefit determinations that they explicitly agreed the Special Master's decision would be "a final and binding determination" of benefits. Settlement Agreement §4.6(g) (emphasis added). There is, of course, no appeal from a "final and binding determination," and the parties negotiated for precisely this result. As designed, the claims administration process provided a mechanism to quickly and fairly compensate deserving plaintiffs commensurate with their injuries, with several levels of review. One important aspect of this design was that the Claims Administrator would know the entire universe of claims within a certain time period; until the universe was knows, he could not make various benefit determinations and payments. Kane's insistence that she should be allowed to "appeal" the Special Master's determinations to this Court (or the Sixth Circuit Court of Appeals) is to insist that the Claims Administrator delay these payments to other class members indefinitely. This is not the deal that counsel designed, or to which the parties, including Kane agreed.

Furthermore, it is not a coincidence that only plaintiffs, and not Sulzer, have sought review of the determinations by the Claims Administrator and the Special Master. During negotiation of the Settlement Agreement, Sulzer agreed to the unusual proposition that it would have no say in the Claims Administration process, in return for the certainty it obtained with the series of deadlines. Sulzer also agreed that it could not challenge the Claims Administrator's determination by appealing to the Special Master, and could not challenge the Special Master's determination by appealing to this Court.

Rule 53 contemplates the filing of objections to a special master's determinations by either party. The mechanism of using a Special Master as actually employed by the Settlement Agreement makes it clear that Rule 53 is inapposite.

It is not overstatement to characterize the claims administration process agreed to by the parties in their Settlement Agreement as a form of binding arbitration. See Harrison v. Nissan Motor Corp. in U.S.A., 111 F. 3d 343, (3rd Cir. 1997) ("Arbitration is creature of contract, a device of the parties rather than the judicial process. If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.") (quoting AMF Inc. v. Brunswick Corp., 621 F.Supp. 456, 460 (S.D.N.Y. 1985) (Weinstein, J.)); see also AMF Inc., 621 F.Supp. at 460 ("[n]o magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the [Federal Arbitration] Act"). As such, the parties explicitly agreed to forego a judicial determination of benefits, including any judicial review of the final decision of the "arbitrator" – the Claims Administrator or Special Master. The only exception to this rule might be if the Special Master's final determination of benefits was a product of corruption, fraud, prejudice, or misconduct. Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 205 F.3d 906, 909 (6th Cir. 2000) (citing 9 U.S.C. § 10(a)). But neither Kane nor any other claimant makes any such allegation; rather, Kane and the other claimants all insist the Special Master abused his discretion. There is no "appeal" allowed to this Court for an abuse of discretion in these circumstances.

Finally, it cannot be ignored that to accept Kane's position is literally to open the floodgates of legal claims. If a claimant can appeal any determination of claims benefits to this Court, then there is reason to expect hundreds, if not thousands, of claimants would do so. Even claimants who do receive benefits would have reason to ask this Court to award them more benefits.[15] If their appeal to this court was

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[15] This would be especially true of the roughly 2,500 claimants seeking

unsuccessful, any claimant could then pursue further appeals. The entire point of the Settlement Agreement was to resolve the thousands of cases filed in federal and state courts. Kane's interpretation of the "special master" provision of the Settlement Agreement would allow all of those cases to be litigated by the undersigned, after all.

In sum: (1) the Special Master appointed by counsel pursuant to the Settlement Agreement was not appointed by the Court pursuant to Rule 53; and (2) the Special Master's determinations are not appealable to this Court under Rule 53 or the Settlement Agreement. Accordingly, Kane's argument that this Court has the authority to review the Special Master's conclusion for an abuse of discretion is not well-taken.

C. Appeal from or Relief from Entry of the Settlement Agreement

A number of claimants cast their requests that this Court review the Special Master's determinations as "appeals" from the Court's judgment, now nearly two years old, approving the Settlement Agreement, or as motions for relief from that judgment. The essence of these requests is that the Court should re-write certain provisions contained in the Settlement Agreement, or should suspend them in a particular case, because they are unfair as applied to the claimants' particular circumstances. These procedural tactics of attacking the Court's judgment approving the Settlement Agreement, however, are unavailing. That these strategms are not allowed under the Federal Rules of Civil Procedure is revealed by examining the history of the Court's entry of judgment.

On March 14, 2002, the Court docketed the then-proposed Final Settlement Agreement, thereby making in available to any attorney with internet access. See docket no. 237. The proposed agreement was also posted at www.sulzerimplantsettlement.com. On March 20, 2002, the Court approved the plans submitted by plaintiffs' class counsel for giving formal notice of this proposed settlement to the

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awards of extraordinary injury benefits, which are more discretionary.

entire class. Docket nos. 216, 243, 244.[16] In addition to this formal notice, the proposed settlement agreement was extremely well publicized by the legal, financial, and popular press. Also, plaintiffs' class counsel conducted numerous seminars and teleconferences around the country, to answer questions from individual plaintiff's counsel about the specific terms of the deal. As a result of all of these outlets, the plaintiff class and their attorneys were generally well aware of the existence and details of the Settlement Agreement. Before the Court held its final fairness hearing on May 6 and 7, 2002, the plaintiffs and their counsel had over 50 days to examine and digest the Settlement Agreement, and to object to any portions of it they thought unfair.

As noted above, the Court received only 30 or so objections to the fairness of the parties' final settlement agreement, and all but seven objections were withdrawn before the final fairness hearing. These are remarkably low numbers. The Court then took an active role at the fairness hearing, questioning counsel and witnesses about all aspects of their Agreement, including even those aspects addressed by objections that had been withdrawn. The Court concluded that the Settlement Agreement represented "the best opportunity for the most people to recover the most money the soonest." Order at 2-3 (docket no. 340). The Court further concluded that:

- the class (and subclasses) identified in the Fifth Amended and Consolidated Class Action Complaint,

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[16] The Court-approved plan for giving notice to the plaintiff class included: (i) advertising in the two largest national daily newspapers; (ii) Internet advertising on sites accessed by the general population, including people who met the definition of the class; (iii) media outreach through the press, including a television video news release, a written radio news release, and a nationally-issued press release; (iv) a mailing to orthopedic surgeons nationwide; (v) notification to all Sulzer sales representatives; (vi) a mailing to hospitals to which the Inter-Op shell and/or Natural Knee tibial baseplate implants were shipped; (vii) paid advertising in daily regional newspapers in locations where 20 or more implants occurred; and (viii) direct mailing to all known Class Members. The plan of notice also incorporated a toll-free 800 number and a web site where class members could obtain information on the settlement. See docket no. 216.

> and also in the Settlement Agreement, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as Fed. R. Civ. P. 23(b)(2) and (b)(3); and
>
> - the Notice that was sent to the Class was the best practicable under the circumstances, and satisfies the requirements of Fed. R. Civ. P. 23(c)(2) & (e); and
> - the proposed settlement was reached after extensive arms-length negotiations and is premised upon substantial inquiry into and discovery relating to all legal and factual issues relevant to the propriety of the proposed Settlement Agreement; and
> - the proposed Settlement Agreement is fair, adequate, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(e).
>
> Indeed, the Court finds that the sizeable and detailed record complied by the parties compels the conclusion that this settlement represents an eminently fair and reasonable resolution for the entire Plaintiff Class.

Order at 3-4 (docket no. 340). Accordingly, the Court granted final approval to the Settlement Agreement on May 8, 2002. After the Settlement Agreement became irrevocable, the Court entered an Order on June 4, 2002, confirming its May 8, 2002 Order and dismissing all settled claims with prejudice. See docket no. 353.

The procedural importance of the May 8 and June 4, 2002 Orders cannot be over-emphasized. As of May 8, 2002, the Court approved the Settlement Agreement, and all the terms it contained. If a plaintiff did not like any of these terms, it was easy for the plaintiff to opt out of participation in the Agreement. Any class member who did not opt out of the Settlement Agreement, however, became bound by its terms. Moreover, the Court took pains to make clear that, if a plaintiff wanted to challenge the Court's conclusion about the fairness of the Settlement Agreement, the time for appeal began to run on June 4, 2002. The June 4 Order explicitly stated: "This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a

final appealable Order." Order at 2. Nobody filed any notice of appeal. As the Court has stated repeatedly since then, "there is no question but that the Court's June 4, 2002 Judgment Order, giving official approval to all of the terms and conditions contained the parties' Settlement Agreement, was final." Order at 3 (Mar. 21, 2003) (docket no. 610); Order at 17-18 (June 12, 2003) (docket no. 738); Order at 2 (Nov. 5, 2003) (docket no. 1280).

When the Court reviewed the Settlement Agreement to determine whether it was "fair, reasonable, and adequate" under Rule 23(e)(1)(C), the Court had only certain options available to it: the Court "could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case." Evans v. Jeff D., 475 U.S. 717, 727 (1986). The Court could not choose to accept only parts of the settlement, and reject other parts. The Court could not, for example, conclude that a given position of the Settlement Agreement was insufficiently fair; and Order the parties to re-write or negotiate that provision. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. Neither the district court nor [a reviewing] court have the ability to 'delete, modify or substitute certain provisions.' The settlement must stand or fall in its entirety." Hanlon v. Chrysler Corp.; 150 F.3d 1011, 1026 (9th Cir. 1998) (citations omitted).

Now, however, many claimants ask the Court to do what the law expressly says it may not do – "delete, modify or substitute certain provisions" contained in the Settlement Agreement, because those provisions are in some way "unfair" as applied to them. Further, these claimants ask the Court to re-examine the fairness of the Settlement Agreement almost two years after the Court entered final judgment concluding it was fair, and approving all of its terms. These claimants make their requests despite having had ample opportunity, before the final fairness hearing, to examine the Settlement Agreement

and object to its terms.

There were three mechanisms available to a plantiff who disagreed with the Court's conclusion that the Final Settlement was fair. First, a plaintiff could opt out. Obviously, none of the claimants now seeking to challenge the Special Master's determinations by seeking this Court's review chose to opt out of participation in the Settlement Agreement. Second, a plaintiff could move the Court to "reconsider" its conclusion that the Settlement Agreement was fair, by filing a post-judgment motion to alter or amend judgment, pursuant to Rule 59, or a motion for relief from judgment, pursuant to Rule 60. See Feathers v. Chevron, U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998). Given that Rule 59 motion must be filed within 10 days after entry of judgment, any requests by claimants for "reconsideration" must be deemed Rule 60 motions, carrying a "significantly higher" standard for relief. Id. In any event, none of the claimants assert any of the grounds listed in Rule 60(b) as a basis for re-examining the entire settlement for "overall fairness." Hanlon, 150 F.3d at 1026. At best, claimants assert that a specific provision of the Settlement Agreement is not fair as applied to them. And third, a plaintiff could challenge the Court's conclusion that the Settlement Agreement is fair by taking an appeal from the Court's June 4, 2002 judgment. But the time within which an appeal from that judgment properly could be taken has long since run.

In sum, the plaintiffs' determination of their requests for review, by this Court, of the decisions of the Claims Administrator and Special Master, as "appeals" or "motions for reconsideration" or "motions for relief," are all invalid. The entry of a final benefits determination, pursuant to the claims administration process, did not revive any plaintiffs' right to challenge the Court's June 4, 2002 judgment. The Court remains of the opinion that the parties' Settlement Agreement in this case meets all of the requirements of Rule 23, and claimants cannot use a late challenge to this conclusion to obtain the Court's review of their final benefits determinations.

III. Conclusion

After the Court concluded that the class action Settlement Agreement in this case was fair, adequate, and reasonable, any given class member could choose to participate in the Settlement Agreement, or instead opt out. A plaintiff's choice to participate in the Settlement Agreement was a choice to accede to all of the terms the Agreement contained, including acceptance of a determination of benefits through a defined, extrajudicial claims administration process.

Requests by plaintiffs that this Court should suspend or modify certain aspects of the claims administration process are not well-taken, whether denominated an "objection to", "appeal of," "motion for relief from," or "motion to amend" the Special Master's final decision. The same is true of documents styled as motions to "enforce," "amend," or otherwise obtain "relief from" the Settlement Agreement. The Special Master's "final and binding determination" of benefits is precisely that.

Finally, although the point is not raised directly in Kane's or any of the other claimants' requests that the Court review or overturn the Special Master's determination, it cannot be ignored that many of these claimants have other sources of remuneration. As discussed above, it appears that the Claims Administrator and Special Master denied benefits to many claimants because their attorneys failed to comply with important, well-published deadlines. Those claimants may have grounds to seek redress from their attorneys – which explains, in part, why so many of these attorneys have sought from this Court yet another level of review. The settlement trust created by the parties, however, was designed only to pay for valid claims made "in accordance with th[e] Settlement Agreement." Settlement Agreement §2.5(d). While the Court has some sympathy for the plight of overworked counsel, the fact remains that the Settlement Trust was not meant to be used, and should not be used, to protect attorneys against their failure to comply with the terms their clients agreed to.

For all the reasons stated in this opinion, plaintiff

Kane's motion to enforce the Settlement Agreement is overruled.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: February 23, 2004

On February 6, 2004, the Court entered an Order denying class-member CeCee Kane's motion to enforce the terms of the class-action settlement agreement in this case. See docket no. 1714 ("Kane Order"). As the Court explained at length in the Kane Order, the attempts by Kane and other class members to obtain judicial review of the benefits decisions of the Claims Administrator and Special Master are neither allowed nor appropriate. This is true whether the attempt is made by filing a document denominated as: (1) an "appeal" to this Court of the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1059); (2) "objections" to the Claims Administrator's and/or Special Master's final decision (e.g., docket no 1257); (3) a "motion for relief" from the Claims Administrator's and/or Special Master's final decision (e.g., docket no. 1667); (4) a motion to amend the Claims Administrator's Procedures (e.g., docket no. 970); (5) a motion to enforce the Settlement Agreement (e.g., Kane's motion, docket no. 1179); (6) a letter asking the Court to direct the Claims Administrator or Special Master to reconsider; or (7) an appeal to the Sixth Circuit Court of Appeals (e.g., docket no. 1617).

Accordingly, the Court hereby **DENIES** and **OVERRULES**

all of the documents listed below, for the same reasons the Court denied Kane's motion. The Court hereby incorporates by reference the reasoning and the result set out in the Kane Order.

The documents filed at the following docket numbers are denied and overruled:

823	1059	1256	1342	1623
899	1076	1257	1390	1624
970	1094	1258	1399	1626
980	1163	1259	1441	1667
981	1179	1260	1470	1730
988	1180	1279	1617	1740
994	1254	1293	1621	1803
1017	1255	1315	1622	

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE